



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 389 of 2010

KENYA HOTELS AND ALLIED WORKERS UNION CLAIMANT

VERSUS

VOYAGER BEACH RESORT.....RESPONDENT

AWARD

This case was heard and finalized by Hon. Justice Charles P. Chemmutut. The award was reserved to be on notice. By the time the Court was reconstituted in July 2012 Hon. Justice Chemmutut had not yet prepared the award. The file was allocated to me for the purposes of preparing the award.

The parties were summoned to appear before me on 6th December 2012 for directions when Mr. Makale appeared for the Claimant and there was no appearance for the Respondent. Mr. Makale informed me that he had no objection to me preparing the award.

I have read the pleadings and the record. The Claimant's case is that the Claimant union is the sole representative of workers in the hotel industry and that the Claimant has recruited more than a simple majority of the unionisable employees of the Respondent at 86%. The union's submissions state that it recruited 257 employees out of one hundred and fifty employees. The union has annexed check off forms as Appendix "PMM3". The union submits that it has met all requirements for recognition and urges the Court to order the Respondent to sign recognition agreement with the Claimant.

The Respondents case is that it is a member of the Kenya Association of Hotel Keepers and Caterers which has a recognition agreement with another union, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers), that the Claimant does not have a simple majority of employees in its membership and that the Claimant is therefore not the sole representative of workers in the Hotel Industry. The Respondent further submits that since it is a member of an association the Claimant should recruit a simple majority from among the members of the Association before it can seek recognition.

On the issue of intimidation of its members the Respondent submits that no evidence has been produced to prove that there has been intimidation of the Claimants members.

On compliance with Section 48 and 50 of the Labour Relations Act the Respondent submits that it has strictly complied with directions of employees on deduction of union dues and that most employees do not want their salaries deducted twice for purposes of contributions to the two unions.

I have considered the written submissions of both parties. The issues for consideration are the following:-

- (i) Whether the Claimant is the appropriate union.

- (ii) If there is no rival union in the hotel industry.
- (iii) Whether the Claimant has recruited a simple majority of the Respondents members.
- (iv) Whether the Respondent has victimized any members of the Claimant.
- (v) Whether the Respondent should be compelled to sign recognition agreement with the Claimant.
- (vi) Whether the Respondent should be ordered to deduct union dues from all employees whose names appear on the check off forms attached to the Claimant's Memorandum of Claim.

1. Whether the Claimant is the appropriate union

The Claimant has not attached a copy of its constitution to prove that the constitution allows it to represent members in the hotel industry.

2. If there is no rival union in the Hotel Industry

The decision in Industrial Court Cause No.39 of 2007 was to the effect that KUDHEIHA should vacate the Hotel Industry upon expiry of existing collective bargaining agreements. It is however a fact that KUDHEIHA still represents a sizeable number of hotels and specifically all the members of the Association of Hotel Keepers and Caterers. I also note that the Respondent has relied on Cause No.109 of 2007 which held that the Claimant cannot demand recognition from individual members of the Association. Because of conflicting decisions, and the fact that KUDHEIHA is in fact representing employees in the hotel industry I find that the Claimant is not the sole union in the Hotel Industry and that KUDHEIHA is a rival union.

3. Whether the Claimant has recruited a simple majority of the Respondents unionisable employees.

The Claimant submits that it has recruited 257 employees and has annexed check-off forms to prove that fact. The Respondent has on the other hand submitted that the Claimant had fluctuating numbers between July 2009 and June 2010 with the highest number being 247 out of 297 in June 2009 and only 123 out of 286 in June 2010.

I have noted that the copy of recognition agreement that the Claimant alleges was not signed by the Respondent is dated 17th August 2007. I will presume therefore that that is the date when the Claimant had achieved a simple majority. Refer to Claimants appendix 4. I have however noted that all the check off forms were sent to the Respondent on 30th November 2008 and relate to membership between 20th May 2007 and 27th September 2008. It is not clear at what point the Claimant achieved membership of 257 as submitted in the claim.

The Claimant has not attached a copy of the letter that forwarded the Recognition agreement to the Respondent. Going by the date of recognition agreement, it would mean that on the date when the Claimant signed it the union had not submitted any names of its members to the Respondent and the Respondent was under no obligation to sign it.

4. Whether the Respondent victimized the Claimants members

No evidence of victimization has been adduced by the Claimant. In fact in the Memorandum of Claim the only mention of victimization is in the prayers.

I find that the Claimant has not proved that there was any victimization.

5. Whether the Respondent should be compelled to sign the recognition agreement.

As found above, the Claimant has not stated at what point it achieved a simple majority. I have also noted that the Respondent is currently a member of the Association of Hotel Keepers and Caterers which has a recognition agreement with KUDHEIHA and in view of the conflicting decisions cited by both parties, I cannot lean on either side. I therefore find that the Claimant has not convinced me that it qualifies for recognition by the Respondent and that I should compel the Respondent to recognize it.

6. Whether the Respondent should be ordered to remit union dues to the Claimant.

The Respondent has attached letters of withdrawal from Claimant union by several employees. The Respondent has further submitted that the employees did not want to be deducted union dues from both KUDHEIHA and the Claimant following an order by the Minister for Labour authorizing deduction of agency fees from employees benefiting from the collective agreement negotiated by KUDHEIHA Workers. It would be against the rights of the workers for this Court to force them to pay union dues in the circumstances.

Finally I am aware that the Claimant has filed a petition which is pending before a three bench Court to determine the issue of representation of employees of the Hotel Industry between the Claimant and KUDHEIHA Workers. I hope that the decision in that petition will clear this issue once and for all.

In conclusion I dismiss the claim by the Claimants. Each party shall bear its costs.

Orders accordingly

Read in open Court and signed on this 27th day of February 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Patrick Makale

In the Presence of:- _____ Claimant

No appearance

_____ for the Respondent